SUPREME COURT, U.S.
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No. 448

IN THE

Supreme Court of the United States

October Term, 1967

BARBARA FLEMMING, a minor, suing by DARLENE B. DE SYLVA, her mother and next friend,

Petitioner,

vs.

ALVA B. ADAMS, ANNA C. PETTEYS, CLARENCE D. BLISS, HUGH E. CHASTAIN, and BERNICE S. FRIEDER, individually and as constituting THE COLORADO STATE BOARD OF EDUCATION; BYRON W. HANSFORD, individually and as COMMISSIONER OF EDUCATION FOR COLORADO; and JOHN A. OGDEN,

Respondents.

PETITION FOR WRIT OF CERTIORARI

To The United States Court of Appeals for the Tenth Circuit

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of the above named petitioner for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit entered May 12, 1967, affirming the judgment of dismissal of the United States District Court for the District of Colorado, entered May 2, 1966, respectfully shows to this honorable Court:

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Tenth Circuit is unreported and is printed in Appendix A hereto. The opinion and order of the United States District Court for the District of Colorado, entered May 2, 1966, and filed May 20, 1966, is unreported and is printed in Appendix B hereto.

JURISDICTION

The date of the judgment sought to be reviewed and the time of its entry are May 12, 1967. There was no request for rehearing and no order granting an extension of time within which to petition for certiorari was made or entered.

The grounds on which the jurisdiction of this Court is invoked are the following:

The action is one arising under an Act of Congress relating to civil rights, United States Code, Title 42, Sections 1983 and 1985 (3).

The jurisdiction of this Court is invoked under provisions of Title 42, United States Code, Section 1984, and Title 28, Section 1254 (1).

QUESTION PRESENTED

The question presented in this petition is whether the petitioner is entitled to an education as a civil right or privilege, secured by the Constitution and laws, within the meaning of 42 USC 1983, and if so, did the conduct of respondents in refusing petitioner's application for special education service for the handicapped constitute a violation of said section.

STATUTE INVOLVED

The statute which the case involves is the Act of Con-

gress of April 20, 1871, ch. 22, Sec. 1, 17 stat. 13, codified as Title 42 of United States Code, Section 1983, and is as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF CASE

In September of 1962, petitioner was fifteen years old and was a student in junior high school under jurisdiction of the Colorado State Board of Education. She suffered physical ailments which qualified her for special educational services under applicable Colorado statutes. Respondents Board of Education were charged under the statute with administration of the Act and with formulating rules and regulations for establishing special education programs. Petitioner's application for special education was denied by the respondents on the ground that it was certified by a chiropractor rather than a doctor of medicine in accordance with a regulation promulgated by them. Petitioner had for years been under the care of a doctor of chiropractic and it was not convenient nor practical for her to change and consult a doctor of medicine and the respondents, Board of Education, furnished no such personnel itself.

Petitioner brought suit in the state courts alleging the actions of the Board were illegal and its regulation void. On appeal the Supreme Court of Colorado declared the Board's regulation to be invalid and that the Board had acted illegal-

ly in denying petitioner's application and directed the lower court to order the Board to complete processing of the petitioner's application.

Approximately three years had now elapsed and petitioner filed suit in federal district court against the respondents under provisions of 42 USC 1983 and 1985 alleging that respondents' illegal and discriminatory actions had deprived her of her right to an education. In a second claim she alleged a conspiracy among defendants to deprive her of a right to an education.

Upon motion the district court dismissed the complaint on the grounds that it did not state a claim. The ruling of the court was that the right to an education is not a right secured by the Constitution and laws and therefore did not come within the provisions of 42 USC 1983. Upon appeal the Court of Appeals for the Tenth Circuit affirmed the district court's judgment on essentially the same grounds.

REASONS FOR GRANTING THE WRIT

I

The Court of Appeals for the Tenth Circuit has said that petitioner's complaint failed to state a cause of action for the reason that the right to an education is not a right or privilege secured by the Constitution and laws. Petitioner believes that it is so secured, at least within the intent and compass of 42 USC 1983. Equality of opportunity for education would be of little avail if the opportunity itself did not exist. When the State of Virginia, in Griffin v. County School Board of Prince Edward County, 84 S. Ct. 1226, 377 U. S. 218, 12 L. Ed 2nd, 256 attempted to deny educational facilities to colored children in Prince Edward County, by closing its schools, this court ruled the attempt invalid on the basis of discrimination. The discriminatory motives of the Virginia legislators were openly announced and so were a

matter of public knowledge, but had their actions been merely wilful or capricious, a basis would surely have been found for nullifying them.

The original purposes of 42 USC 1983, as discussed by the court in Monroe v. Pape, 365 U. S. 167, 81 S. Ct. 473, 5 L. Ed 2nd 492, have been expanded to include a broad area of remedy, including, petitioner believes, the circumstances of her own case. She was deprived by the illegal acts of respondents of an opportunity to receive education guaranteed by her own state constitution and statutes and has no redress in the courts of that state.

In modern society, education is more than important to the individual member; it is indispensable. As the Court stated in Brown v. Board of Education, 74 S. Ct. 686, 347 U. S. 483, 98 L. Ed. 873:

> "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

II

Apart from the question of whether the right to an education is itself secured by the Constitution and laws, petitioner believes her complaint sufficient and that the Court of Appeals decided the federal question in a way which conflicts with applicable decisions of this court. Her claim was based on the simple proposition that she was entitled to educational privileges as provided by her state government and that the defendants applied an invalid and discriminating standard in denying her application for such privileges. Her case is not different in theory from the myriad cases brought under 42 USC 1983, e. g. Kerr v. Enoch Pratt Free Library,

149 F 2nd 212, cert. denied 66 S. Ct. 26, 326 U. S. 721, 90 L. Ed 427 and Franklin v. County School Board of Giles County, 242 F. Supp. 371. It lacks only the dramatic setting of discrimination based upon color or violence.

But to her the inequality of treatment was no less real than that of negroes deprived of educational opportunity on an equal basis with whites. In Brown v. Board of Education, the Court ruled that public schools which were segregated on the basis of color were in violation of the constitution. If Brown is not compelled to attend a segregated school, even though such school were in every way equal to that of whites, the petitioner here should likewise not have been compelled to go to a physician acceptable to the respondents, whether or not this was her own physician, or be deprived of her opportunity for education.

The appeals court conceded that "color of statute" was present in petitioner's case and that this was admitted by all parties. It should not then have approved dismissal of petitioner's complaint which alleged the other necessary ingredient under 42 USC 1983, namely, discriminatory application under the fourteenth amendment.

CONCLUSION

Wherefore, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Court of Appeals for the Tenth Circuit be granted.

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APPENDIX A

United States Court of Appeals

TENTH CIRCUIT

No. 8816—MAY 1967 TERM

BARBARA FLEMMING, a minor, suing by DARLENE B. DE SYLVA, her mother and next friend,

Appellant,

v.

ALVA B. ADAMS, ANNA C. PETTEYS, CLARENCE D. BLISS, HUGH E. CHASTAIN, and BERNICE S. FRIEDER, individually and as constituting THE COLORADO STATE BOARD OF EDUCATION; BYRON W. HANSFORD, individually and as COMMISSIONER OF EDUCATION FOR COLORADO; and JOHN A. OGDEN,

Appellees.

APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

John T. Maley, Denver, Colo. (Robert A. Schiff, Denver, Colo., with him on the Brief), for *Appellant.*

Paul D. Rubner and Richard W. Laugeson, Jr., Denver, Colo. (Duke W. Dunbar, Attorney General, Frank E. Hickey, Deputy Attorney General, James W. Creamer, Jr., Assistant Attorney General, Denver, Colo.; Wormwood, Wolvington, Renner & Dosh, Denver, Colo., with them on the Brief), for *Appellees.*

Before BREITENSTEIN, SETH and HICKEY, Circuit Judges.

SETH, Circuit Judge.

The plaintiff-appellant, a minor suing by her mother, brought this civil rights action against the defendant-appellees in the United States District Court of Colorado, alleging that the appellees had deprived the appellant of rights secured to her by the United States Constitution and seeking compensatory and exemplary damages under 42 U.S.C.A. §§ 1983 and 1985(3).[1] The appellees include the members of the Colorado State Board of Education, the Colorado Commissioner of Education, and a consultant in special education to the Board (referred to hereinafter as the Board).

The facts upon which this action is founded may be summarized from the record as follows: In 1962, the appellant was fifteen years old and a student at a public junior high school in Jefferson County, Colorado. At this time, the appellant suffered from certain physical disabilities which prevented her attendance at school. The appellant was advised that she could apply for special education services for the handicapped authorized by article 22, chapter 123 of the 1953 Colorado Revised Statutes. The Act vested administration in the Board and empowered it to prescribe rules and regulations for establishing special education programs in the local school districts. The Act required that children applying for these services "undergo physical and psychological examination by state accredited personnel" to determine if

[1]Sections 1983 and 1985(3) are derived from the Ku Klux Act of 1871, 17 Stat. 13, and are among the earliest federal statutes enacted to protect civil rights. See Monroe v. Pape, 365 U.S. 167 (1961); Byrd v. Sexton, 277 F.2d 418 (8th Cir.); Note, 39 N.Y.U.L.Rev. 839 (1964).

the child was eligible and would derive benefit from such services.

The Board, pursuant to its rule-making authority, promulgated a rule that eligibility for the special education services must be certified by "a physician licensed to practice medicine in Colorado"; and so construing the statutory term "accredited personnel" to mean a physician. The appellant's application bore a certificate of eligibility signed by a chiropractor, and the Board refused to approve her application for this reason. The appellant then filed suit against the Board in a state court seeking an order compelling the Board to approve the application. In Flemming v. Colorado State Board of Education, 400 P. 2d 932 (Colo. 1965), the Colorado Supreme Court held that "state accredited personnel" included chiropractors because the phrase referred to all persons licensed in Colorado to practice the healing arts. The court then held that the Board's rule was inconsistent with the statute and beyond the Board's power to promulgate. It ordered the Board to process the appellant's application for special education services.

The appellant thereafter filed the instant suit. The first count of appellant's complaint alleges that the appellees deprived her of the right to an education secured by the United States Constitution, thus seeking to assert a cause of action under 42 U.S.C.A. § 1983.[2] The second count of the complaint alleges that the appellees conspired to deny the appellant equal protection of the laws thus attempting to come within 42 U.S.C.A. § 1985(3). The defendant-appellees filed a motion to dismiss the action which was granted by the District Court on the specific ground that the appellant

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[2]Section 1983, 42 U.S.C.A., provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

had failed to show a deprivation of any constitutional rights because the right to an education is not guaranteed under the federal constitution.

This court, in Stringer v. Dilger, 313 F.2d 536 (10th Cir.), stated the statutory prerequisites for liability under § 1983 to be that the defendant must have acted "under color of" state or local law, and the plaintiff must have been deprived of constitutional rights, privileges, or immunities. The first statutory prerequisite has been satisfied in the case at bar, for the appellees are state officials and employees who acted under authority of Colorado statutes. The appellees here do not contend otherwise. However, the second prerequisite under the statute, deprivation of a constitutional right, has not been met.

The appellant argues that a right to an education is one of the rights secured to her by the United States Constitution, and that the Board deprived her of that right by refusing to approve her application for special education services. Although the importance of education to our democratic society is obvious to all, Brown v. Board of Education, 347 U.S. 483 (1954), we do not agree that the right to an education is among those rights guaranteed by the federal constitution. The appellant has referred us to no language in the Constitution wherein the right of any person to an education is established, expressly or by implication. We are referred to Supreme Court decisions which the appellant interprets as recognizing a constitutional right to an education. These cases, without exception, were decided by reference to equal protection clause of the fourteenth amendment to the Constitution. The fourteenth amendment does require that an opportunity for education, "where the state has undertaken to provide it, be made available to all on equal terms." Brown v. Board of Education, supra. See also Griffin v. County School Board, 377 U.S. 218 (1964); Cooper v. Aaron, 358 U.S. 1 (1958); Byrd v. Sexton, 277 F.2d 418 (8th Cir.). The United

States Constitution does not secure to the appellant the right to an education; rather the Constitution secures the appellant's right to equal treatment where the state has undertaken to provide public education to the persons within its borders.

By appropriate statute, the Colorado Legislature has undertaken to provide special education services to handicapped children, and it is not suggested on appeal that classification of certain children as handicapped for purposes of determining their eligibility for special education services is unconstitutional. Indeed, the appellant claims to be a handicapped child within the classification drawn by the Colorado Legislature and therefore entitled to the special education services authorized by the Colorado statutes.

Although the Colorado State Board of Education is an administrative agency of the state, the statutes under which the Board administered the special education program authorized the Board to exercise quasi-legislative and quasi-judicial powers. In our view, the Board's rule that eligibility for special education services be certified by a physician licensed to practice medicine was a reasonable exercise of the Board's authority under the rather indefinite statutory language providing that physical examinations be performed by "state accredited personnel."

Even though the Colorado Supreme Court held that chiropractors were included in the phrase "state accredited personnel," it is manifest that the Board's rule was promulgated in good faith and was applied equally to all applicants until the state supreme court ruled that the Board had misconstrued the statute. See Pierson v. Ray, 35 U.S.L.Week 4342 (U.S. April 11, 1967). It appears that the Board promulgated the rule for the sole purpose of performing its assigned governmental duty, administration of the special education program, without any design to harm the appellant or

to promote any form of unconstitutional discrimination. *Cf.* Moran v. Bench, 353 F.2d 193 (1st Cir.). We find no deprivation of appellant's constitutional rights under 42 U.S.C.A. § 1983, nor do we find a conspiracy among the appellees to deprive the appellant of equal protection of the laws under 42 U.S.C.A. § 1985(3). The District Court properly dismissed the action.

AFFIRMED.

APPENDIX B

IN THE

United States District Court

FOR THE DISTRICT OF COLORADO

Civil Action No. 66-C-97

BARBARA FLEMMING, a minor, suing by DARLENE B. DE SYLVA, her mother and next friend,

Plaintiff,

vs.

ALVA B. ADAMS, ANNA C. PETTEYS, CLARENCE B. BLISS, HUGH E. CHASTAIN, and BERNICE S. FRIEDER, individually and as constituting THE COLORADO STATE BOARD OF EDUCATION; BYRON W. HANSFORD, individually and as COMMISSIONER OF EDUCATION FOR COLORADO; and JOHN A. OGDEN,

Defendants.

Messrs. Maley and Schiff, Attorneys at Law, 104 Broadway, Denver, Colorado, for Plaintiff; Honorable Duke W. Dunbar, Attorney General, Mr. John W. Patterson, Assistant Attorney General, 104 State Capitol, Denver, Colorado, for Defendants, and Messrs. Wormwood, Wolvington, Renner and Dosh, Attorneys at Law, 810 Symes Building, Denver, Colorado, appearing generally for defendants Byron W. Hansford and John A. Ogden.

MEMORANDUM OPINION AND ORDER

DOYLE, Judge.

This case arises under the Constitution of the United States and the Civil Rights Acts, Title 42 U.S.C., Sections

1983, 1985 and 1988. Defendants Adams, Petteys, Bliss, Chastain and Frieder constituted the Colorado State Board of Education at the time in question; defendants Hansford and Ogden were Commissioner of Education and Consultant in Special Education, respectively, at such time. The action seeks damages and exemplary damages allegedly resulting from the deprivations complained of.

In September 1962, plaintiff was fifteen years of age and a student in a junior high school within the State Board of Education's jurisdiction. According to the complaint she suffered physical ailments which qualified her for special educational services under the applicable Colorado statute, CRS 1953, Section 123-22-2. Plaintiff applied for such services, including in her application a letter from her personal physician, a doctor of chiropractic licensed to practice in Colorado. The application and an accompanying letter were received by the Board in November, 1962.

It is alleged that the Board, acting on the advice of defendants Hansford and Ogden, denied plaintiff's application on the grounds that chiropractors were not licensed physicians within the meaning of regulations promulgated by the Board providing that eligibility for special educational services must be certified by "a physician licensed to practice medicine in Colorado." It is further alleged that the Board informed plaintiff's local school authorities that no reimbursement for educational expenses would be paid if an enrolee were not certified by a qualifying physician, and that the Board refused to supply suitable personnel to examine plaintiff. The regulation in question was held null and void, as exceeding the authorized powers of the Board, by the Colorado Supreme Court, *Flemming v. Board*, 400 P. 2d 932 (1965). Plaintiff alleges the acts of the Board were with malice, wanton and reckless, and deprived her of rights and privileges secured to her by the United States Constitution. It is further alleged that defendants Hansford and Ogden con-

spired to deprive plaintiff of such rights. Plaintiff seeks damages for such alleged misconduct and also exemplary damages for the alleged malice. Plaintiff contends that one of the "rights and privileges" secured by the Constitution is the right to an education guaranteed by the Constitution and laws of Colorado and by Article IV, Section 2 of the United States Constitution.

Defendants have moved to dismiss the complaint on the narrow ground that all were acting within the scope of their official employment and were thus absolutely immune from suit for civil damages. It is conceded, however, that no court has yet directly held school boards absolutely immune from civil damage suits under the Civil Rights Acts. The numerous cases cited by defendants deal either with immunity of judicial and quasi-judicial officers in tort actions for damages for acts committed within their official capacity, or with immunity of such officials from libel actions. It is true that in *Preble v. Johnson*, 10 Cir. 1960, 275 F. 2d 275, the Court of Appeals for this circuit held that a civilian employed by the federal government as Director of Maintenance Control at a naval training center was absolutely immune from suit in a civil libel action. However, neither the Civil Rights Acts nor the Constitution were there involved. It is also true that in *Belveal v. Bray, et al.*, Civil Action No. 9196, December 8, 1965, this Court indicated that in suitable circumstances the Colorado State Board of Parole would be within the protection of the immunity doctrine in a suit for damages brought under the Civil Rights Acts. A distinction was made in that case between authorized and unauthorized actions of such officials. Plaintiff was there allowed to amend the complaint to show absence of such authority. The decisions of this Court and of the Tenth Circuit do not support defendants' contentions.

Recent decisions involving the Civil Rights Acts suggest that there are limitations on immunity in this area of substantial constitutional rights. See *Hornsby v. Allen*, 5 Cir.,

1964, 326 F. 2d 605; *Birnbaum v. Trussell*, 2 Cir., 1965, 347 F. 2d 86. Such decisions suggest that in cases involving alleged violations of the Civil Rights Acts, the purposes of the rule of absolute immunity must be tested in light of the facts of each case and the broad remedial nature of the acts. Any other approach, it is argued, could render meaningless the requirements in such acts that alleged defendants be acting "under color of law." See note: "The Doctrine of Official Immunity under the Civil Rights Acts," 68 Harvard Law Review 1229 (1955).

We do not here undertake to declare generally the policy considerations underlying the principles of officer immunity or to determine the specific limitations which are applicable to Civil Rights Acts cases. Nor do we determine whether these particular defendants acted in excess of their authority and therefore cannot invoke the protection of the rule of immunity. See *Dugan v. Rank*, 372 U.S. 609, 83 S. Ct. 999 (1963); *Basista v. Weir*, W. D. Pa., 1964, 225 F. Supp. 619.

Such determinations are unnecessary in the light of the fact that the complaint here wholly fails to state a cause of action upon which this Court may grant relief. The Civil Rights Acts protect rights guaranteed to citizens by the laws or Constitution of the United States. Plaintiff's sole contention here is that she has been deprived of the "right to an education." No decision is offered to support the contention that the federal Constitution guarantees a right to an education, nor are facts presented which in any way reveal how defendants' alleged acts worked to completely deprive plaintiff of "an education." The alleged facts reveal no discrimination against this plaintiff amounting to a deprivation of her federally-protected rights to due process and equal protection of the law. The Colorado State Board of Education promulgated a ruling that chiropractors did not qualify as licensed physicians under certain regulations of the Board. The fact that such ruling adversely affected plaintiff's appli-

cation for special education and was later declared void does not support plaintiff's allegations of violation of federally-protected rights. Nor do conclusionary allegations of conspiracy and malice, unsupported by any factual allegations, afford any basis for inferring discrimination or other equal protection violations.

The jurisdiction of this Court is, contrary to the belief of many citizens, including some members of the bar, limited. We are not authorized to entertain every grievance, real or fancied, which a person may have. Our federal question powers are limited and the allegation that a question is of constitutional calibre does not make it so. The basis of this suit is the ruling of the Board that a physician's certificate was necessary. Can it be said that the plaintiff had a constitutional right to be examined by a chiropractor? I think not. She could have had the benefits demanded by submitting a physician's certificate. Her own decision "deprived" her of an education; thus, even assuming the right to an education to be constitutional, defendants did not deprive her of it.

In the absence of any showing of a violation of federally-protected rights, this Court has no subject matter jurisdiction under the Civil Rights Acts. Accordingly, it is

ORDERED, that defendants' motion to dismiss be, and the same hereby is, granted.

DATED at Denver, Colorado, this Second day of May, A. D. 1966.

BY THE COURT:

WILLIAM E. DOYLE, *Judge*
United States District Court